No. 94-879

In the Supreme Court of the United States

OCTOBER TERM, 1994

H. ALLAN LEGGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the filing of a federal felony complaint against petitioner triggered his Sixth Amendment right to counsel.

2. Whether the government adequately established the authenticity of a tape recording of a telephone conversation between a government informant and petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A9) is unreported, but the decision is noted at 29 F.3d 621 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1994. A petition for rehearing was denied on August 12, 1994. Pet. App. A1-A2. The petition for a writ of certiorari was filed on November 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and six counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 48 months' imprisonment, to be followed by three years' supervised release. Gov't C.A. Br. 1-2. The court of appeals affirmed. Pet. App. A3-A9.

1. Petitioner was the president of American Credit Indemnity Co. (ACI), a credit insurance company that provides coverage designed to guarantee the accounts receivable of a seller of merchandise. ACI sold some of its policies through brokers, who ordinarily received a 5% commission on each sale. In 1984, ACI established a "master broker" program that rewarded brokers who brought ten or more clients to ACI with a 12% commission on each sale. Gov't C.A. Br. 3-4.

At the outset of the master broker program, petitioner proposed to Seymour Wilson, the regional vice president of ACI's New York office, that they assign credit insurance policies to phony master brokers who were not responsible for bringing to ACI the clients who purchased the policies, give the phony master brokers a small percentage of the 12% commissions, and obtain for themselves the balance of the commissions as "kickbacks." Pursuant to that scheme, petitioner recruited Richard Amsterdam, Daniel Sullivan, and Arnold Holt to serve as phony master brokers. Between 1984 and May 1991, petitioner and Wilson assigned entities controlled by Amsterdam, Holt, and Sullivan commissions on 220 ACI credit insurance policies. Gov't C.A. Br. 3-5. As a result of the scheme ACI issued $1.5 million in fraudu-

lent commissions, and petitioner received more than $450,000 in kickbacks. *Id.* at 6-7.

In May 1991, during a meeting at ACI headquarters, Wilson admitted his participation in the scheme to company officials. A short time later, he agreed to cooperate with the government in the investigation of petitioner. Gov't C.A. Br. 8. On July 26, 1991, the United States filed a sealed complaint against petitioner charging him with the same fraudulent scheme that later resulted in his indictment. On the same date, the United States obtained a warrant for petitioner's arrest. *Id.* at 12. On September 7, 1991, Wilson recorded a telephone conversation with petitioner. In that conversation, petitioner made several incriminating admissions, urged Wilson to deny any knowledge of the scheme if interviewed by the authorities, and provided Wilson with a cover story for Amsterdam to use to explain his involvement in the master broker program. *Id.* at 8-9.

2. Before trial, petitioner moved to suppress the recording of the September 7, 1991 telephone conversation on the ground that the United States had violated his Sixth Amendment right to counsel by instigating Wilson's contact with him after the government had filed a sealed complaint and obtained an arrest warrant. The district court denied the motion. Pet. App. A21-A23. The court held that the filing of the complaint and the issuance of the arrest warrant did not constitute the formal initiation of judicial proceedings against petitioner and thus that his Sixth Amendment right to counsel had not attached when Wilson initiated the telephone conversation with him. *Id.* at A22-A23.

At trial, the prosecutor showed Wilson a copy of the tape, and Wilson testified that he had listened to it, that he recognized the voices on it, and that the tape fairly and accurately reflected the contents of his conversation

with petitioner on September 7, 1991. Gov't C.A. Br. 22. Petitioner objected to the admission of the tape of the September 7 conversation, arguing that a 2.9-second gap in the tape impugned its accuracy. Wilson testified, however, that he had caused the gap by accidentally depressing the record button on the tape recorder while listening to the conversation. *Id.* at 22-23. The district court admitted the tape. Pet. App. A18, A20. At trial, the government and petitioner each introduced expert testimony regarding the origin and significance of the 2.9-second gap on the tape. Gov't C.A. Br. 10, 11.

3. The court of appeals affirmed. Pet. App. A3-A9. It rejected petitioner's contention that the government violated his Sixth Amendment right when Wilson, a government informant, contacted him by telephone on September 7, 1991, two months after the government filed the sealed complaint and obtained an arrest warrant. Relying on Judge Friendly's opinion in *United States* v. *Duvall*, 537 F.2d 15 (2d Cir.), cert. denied, 426 U.S. 950 (1976), the court held that the filing of a federal complaint does not trigger the Sixth Amendment right to counsel. Pet. App. A4. The court explained that the filing of a complaint does not initiate formal "adversary judicial proceedings" and thus is not a stage of a criminal prosecution at which a defendant requires counsel. Pet. App. A5 (quoting *Moran* v. *Burbine*, 475 U.S. 412, 431 (1986)).

The court of appeals also held that the district court did not abuse its discretion by admitting the September 7, 1991, tape recording. According to the court of appeals, the district court "could properly have found that the Government had met [the] requirement[s] of Fed. R. Evid. 901(a)] and produced 'clear and convincing evidence of authenticity and accuracy.'" Pet. App. A6 (quoting *United States* v. *Ruggiero*, 928 F.2d 1289, 1303

(2d Cir.), cert. denied, 112 S. Ct. 372 (1991)). Petitioner's claim that Wilson had tampered with the tape rested on witness credibility determinations that the district court properly left to the jury. Pet. App. A6.

ARGUMENT

1. Petitioner contends (Pet. 11-21) that the filing of the criminal complaint against him triggered his Sixth Amendment right to counsel and thus that the government violated his right to counsel by having a government informant initiate a telephone conversation with him after the complaint was filed. The court of appeals correctly rejected that claim. The courts are in agreement that a federal felony complaint does not begin formal adversary judicial criminal proceedings, and that the Sixth Amendment right to counsel thus does not attach when a complaint is filed. That question thus warrants no further review.

The Sixth Amendment right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). As this Court has explained, "the 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *United States* v. *Gouveia*, 467 U.S. 180, 188-189 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)). The Court has extended the counsel guarantee "to certain 'critical' pretrial proceedings," but it has done so only when "'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.'" *Gouveia*, 467 U.S. at 189 (quoting *Ash*, 413 U.S. at 310). In light of those prin-

ciples, the Court held in *Gouveia* that the right to counsel does not arise at the time of arrest. See 467 U.S. at 190.

The filing of a federal complaint does not begin formal adversarial proceedings and thus the right to counsel does not attach at that time. Under the Federal Rules of Criminal Procedure, a federal prosecution can be initiated only by the filing of an indictment or an information. See Fed. R. Crim. P. 7(a). Complaints and warrants, governed by Federal Rules of Criminal Procedure 3 and 4, in contrast, are categorized under the Rules as "Preliminary Proceedings." Moreover, contrary to petitioner's assertion that "[a] complaint is functionally equivalent to an indictment," Pet. 15, a federal felony complaint serves primarily as a basis for law enforcement authorities to obtain an arrest warrant, and cannot serve as the basis for subjecting the defendant to trial. 8 James Wm. Moore *et al.*, Moore's Federal Practice ¶ 3.02 (2d ed. 1994).[1] Thus, the filing of a complaint alone does not initiate a stage at which the defendant is confronted by judicial proceedings, the intricacies of the law, or the government as a formal adversary. See *Gouveia*, 467 U.S. at 188-189; *Kirby*, 406 U.S. at 689. Every federal court of appeals to have considered the issue has thus held that the government does not trigger a defendant's Sixth Amendment right to counsel by filing a complaint and obtaining an arrest warrant. See, *e.g.*, *United States* v. *Langley*, 848 F.2d

[1] Given the function of a federal criminal complaint in procurement of warrants, Judge Friendly noted in *Duvall* that "to hold that the accrual of the right to counsel is accelerated by use of the warrant procedure would tend to discourage [the authorities from obtaining warrants] whereas the policy should be to encourage [them]." *Duvall*, 537 F.2d at 22.

152, 153 (11th Cir.), cert. denied, 488 U.S. 897 (1988); *United States* v. *Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987), cert. denied, 486 U.S. 1011 (1988); *Duvall*, 537 F.2d at 20-22.

Petitioner identifies no federal appellate decision that conflicts with the Second Circuit's decision here, but contends instead that the decision below conflicts with decisions of several state courts. Pet. 19-21. That "apparent split of authority," however, "is explainable by the fact that [a complaint] is used for multiple purposes," and in some jurisdictions can serve as a formal charging document. Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.4, at 467 (1984). Each of the state cases upon which petitioner relies arose in a jurisdiction in which a complaint plays a role in initiating an adversary criminal proceeding that it does not play under federal law. In New York, for example, as the New York Court of Appeals explained in *People* v. *Samuels*, 400 N.E.2d 1344, 1346 (1980), a criminal complaint is "an accusatory instrument," which "[b]y statute" commences a criminal action. See also *Forte* v. *State*, 707 S.W.2d 89, 92 (Tex. Ct. Crim. App. 1986) (because "formal adversary [judicial] proceedings" were not initiated until a complaint was filed, defendant's decision to give a breath sample to the police at an earlier time was not a critical stage at which the Sixth Amendment right to counsel attached); *People* v. *Anderson*, 842 P.2d 621, 623 (Colo. 1992) (suggesting that a complaint is equivalent to an information under state law).[2]

[2] Petitioner also relies on *People* v. *Hayes*, 564 N.E.2d 803 (Ill. 1990), cert. denied, 449 U.S. 967 (1991), but that decision supports the position taken by the court of appeals. In *Hayes*, the Supreme Court of Illinois held that the filing of a complaint does not constitute the initiation of formal adversary proceedings unless the circumstances surrounding its issuance show that "the State's

2. Petitioner also contends (Pet. 21-25) that the district court erred in finding that the September 7, 1991, tape recording satisfied the authentication requirements of Federal Rule of Evidence 901. That contention does not warrant further review.

Federal Rule of Evidence 901 sets forth the authentication requirements for evidence that a party seeks to introduce in a federal trial. Rule 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Rule treats preliminary questions of authentication and identification as matters of conditional relevance according to the standards of Federal Rule of Evidence 104(b).[3] See 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 901(a)[01], at 901-15 (1994). Thus, as a threshold matter, to introduce evidence under Rule

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prosecutorial forces have focused upon the accused," which the court in that case held had not yet occurred upon the filing of the complaint. 564 N.E.2d at 818. Petitioner's reliance on *Jones* v. *State*, 216 N.W.2d 224 (Wis. 1974), also is unavailing. In that case, no complaint had been filed against the defendant and therefore the Supreme Court of Wisconsin did not have to decide whether the filing of a complaint triggered the Sixth Amendment right to counsel. In any event, the decision in *Jones* rests on a Wisconsin complaint, not a federal one. *Id.* at 227 (explaining that, in Wisconsin, "the substantial equivalent of the federal post-indictment stage began after the issuance of the warrant or complaint").

[3] Rule 104(b) states:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

901(a) the proponent need only provide "sufficient proof * * * that a reasonable juror could find in favor of authenticity." *Weinstein's Evidence, supra*, ¶ 901 (a)[01], at 901-19 (1994). The question whether sufficient proof was offered to support admission of the evidence is within the discretion of the district court. See *United States* v. *Ruggiero*, 928 F.2d 1289, 1303 (2d Cir.), cert. denied, 112 S. Ct. 372 (1991); *United States* v. *Biggins*, 551 F.2d 64, 66 (5th Cir. 1977). The ultimate determination of authenticity, turning on issues of credibility and probative force, is then left to the jury. *Weinstein's Evidence, supra*, ¶ 901(a)[01], at 901-17. See also *United States* v. *Branch*, 970 F.2d 1368, 1370-1371 (4th Cir. 1992); *United States* v. *Black*, 767 F.2d 1334, 1342 (9th Cir.), cert. denied, 474 U.S. 1022 (1985); *United States* v. *Sliker*, 751 F.2d 477, 499 (2d Cir. 1984), cert. denied, 470 U.S. 1058 (1985).

Here, the government satisfied the initial requirement of Rule 901(a) through the testimony of Seymour Wilson, who made the tape recording of his September 7, 1991, telephone conversation with petitioner. Wilson testified that he had listened to the recording, that he recognized the voices on it, and that the tape fairly and accurately reflected the contents of his conversation with petitioner on that date. The government thereby sustained its burden to make a prima facie showing that the tape was a recording of the September 7, 1991, conversation between petitioner and Wilson. In view of that evidence, the district court did not abuse its discretion by admitting the tape. See *United States* v. *Lance*, 853 F.2d 1177, 1181-1182 (5th Cir. 1988) (holding that tape was adequately authenticated by testimony of a co-conspirator who had become a government informant); *United States* v. *Lively*, 803 F.2d 1124, 1129 (11th Cir. 1986) (holding that tape was properly admitted despite seven-second gap).

The questions raised by petitioner regarding the tape's authenticity were properly left to the jury. Petitioner contended that the 2.9-second gap in the tape showed that it had been tampered with. Petitioner introduced evidence, including expert testimony, regarding the accuracy and authenticity of the tape. The jury was entitled to credit petitioner's evidence to the degree it was persuaded by it; it could have entirely disregarded the tape recording if it found that the evidence showed it to be unauthentic, and conversely, the jury was free to rely on the tape if it found it to be authentic and persuasive. In sum, the district court correctly allowed the jury to consider the tape, and petitioner does not contend that the jury erred in assessing its probative value.

Petitioner contends that review is warranted because the courts of appeals are divided between those that require, as a condition of admission, proof of the seven elements set forth in *United States* v. *McKeever*, 169 F. Supp. 426, 430 (S.D.N.Y. 1958), rev'd on other grounds, 271 F.2d 669 (2d Cir. 1959), and those, such as the Second Circuit in this case, that take a more flexible approach to the admission of tape recordings. The minor differences among the courts of appeals concerning the standard for authentication of tape recordings do not amount to a conflict warranting this Court's review.

In *McKeever*, the court held that the proponent of a tape recording must establish the following seven facts: (1) that the recording device was capable of taping the conversation offered in evidence; (2) that the operator of the device was competent to operate it; (3) that the recording was authentic and correct; (4) that changes, additions, or deletions had not been made in the recording; (5) that the recording was preserved in a manner that is shown to the court; (6) that the speakers

have been identified; and (7) that the conversation elicited was made voluntarily and in good faith, without any kind of inducement. *McKeever*, 169 F. Supp. at 430. In *United States* v. *McMillian*, 508 F.2d 101, 104 (1974), cert. denied, 421 U.S. 916 (1975), the Eighth Circuit adopted the *McKeever* factors, and it continues to adhere to them. See *United States* v. *Buchanan*, 985 F.2d 1372, 1378 (8th Cir. 1993), cert. denied, 114 S. Ct. 2727 (1994).[4]

Other courts have taken a more flexible approach, allowing the admission of tape recordings as long as the proponent shows their accuracy and authenticity. See, *e.g.*, *United States* v. *Sivils*, 960 F.2d 587, 597 (6th Cir.), cert. denied, 113 S. Ct. 130 (1992); *United States* v. *Ruggiero*, 928 F.2d at 1303; *United States* v. *Degaglia*, 913 F.2d 372, 375 (7th Cir. 1990); *United States* v. *Sandoval*, 709 F.2d 1553, 1554-1555 (D.C. Cir. 1983); *United States* v. *King*, 587 F.2d 956, 961 (9th Cir. 1978);

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[4] The Eighth Circuit does not, however, rigidly apply those factors. In *Buchanan*, for example, the court held that the mere existence of the tape rendered unnecessary any showing on the first *McKeever* factor—the capability of the recording device. 985 F.2d at 1379.

Petitioner contends (Pet. 22) that the Third Circuit also applies the *McKeever* factors. In *United States* v. *Starks*, 515 F.2d 112, 121 (3d Cir. 1975), on which petitioner relies, however, the Third Circuit stated only that the *McKeever* factors are "useful." Petitioner also cites *United States* v. *Cianfrani*, 573 F.2d 835, 842-843 (3d Cir. 1978), but that decision did not review the admission of evidence or apply *McKeever*; rather, it involved an attempt by news organizations to unseal the record of an evidentiary hearing in which evidence was suppressed. *McKeever* was mentioned to only as part of the factual background to the unsealing claims. Moreover, the court in *Cianfrani* characterized *Starks* as "recommend[ing]" that one of the *McKeever* factors be proved as a condition of admissibility. 573 F.2d at 842. Petitioner cites no Third Circuit case that requires use of the *McKeever* factors.

United States v. *Biggins*, 551 F.2d at 67. Although those courts often rely on the factors identified in *McKeever*, they eschew an approach that even petitioner concedes is "mechanical," Pet. 23, because "the varying circumstances of particular cases * * * militate against [the] adoption of inflexible criteria applicable to all cases." *United States* v. *Fuentes*, 563 F.2d 527, 532 (2d Cir.) (*McKeever* factors are "a valuable formulation of the factors a trial judge should consider"), cert. denied, 434 U.S. 959 (1977). See also *United States* v. *Branch*, 970 F.2d at 1371-1372 (*McKeever* factors "provide guidance"); *United States* v. *Smith*, 692 F.2d 693, 698 (10th Cir. 1982) (quoting *Fuentes*); *Biggins*, 551 F.2d at 67 (using *McKeever* factors, but not requiring "[s]trict compliance"); *United States* v. *King*, 587 F.2d at 961 (*McKeever* elements "are useful, but not dispositive, guidelines").

Moreover, *McKeever* was decided long before the promulgation of the Federal Rules of Evidence in 1972 and before the admission of tape recordings had become commonplace. Thus, although some of the *McKeever* factors remain relevant, others have limited continuing utility. For example, the government rarely will be able to establish that a tape recording is what it claims it to be without establishing the identity of the speakers and the accuracy of the tape. On the other hand, as even the Eighth Circuit has acknowledged, there is no reason to insist on explicit proof that the recording device was capable of making the recording, because the fact that "the tape recording exists" adequately demonstrates the capability of the recorder. *United States* v. *Buchanan*, 985 F.2d at 1379. Similarly, the process of tape recording has become simplified, so proof of the competency of the recorder's operator is often unnecessary. In sum, the flexible approach taken by the majority of the courts of

appeals takes into account the relevant *McKeever* factors and suffices to satisfy the generous standard of admissibility under Federal Rule of Evidence 901(a). Accordingly, there are no meaningful differences in the standards of admissibility set by the courts of appeals, and review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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